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Nor Zairawathy bt Abd Razak v Kossan Latex Industries (M) Sdn Bhd (Majlis Peguam, intervener)

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HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-17D-2–01 OF 2022
WAN AHMAD FARID J
26 JUNE 2023

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Legal Profession — Disciplinary proceedings — Withdrawal of complaint — Complainant withdrew complaint against lawyer after Disciplinary Board ('DB') ordered her suspension for a year — DB had affirmed finding of Disciplinary Committee ('DC') that lawyer was guilty of dishonesty, fraud and deception but rejected its recommendation that she be struck off the Rolls — Whether DB might have come to a different decision if withdrawal of complaint was communicated to it earlier — Whether court would set aside DB's order to give effect to complainant's withdrawal and also because complainant did not take any stand during hearing of lawyer's application to set aside DB's order

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The applicant was a lawyer who acted for the vendor in a sale and purchase agreement ('SPA') for the sale of a piece of land to the respondent. The party who signed the SPA as vendor was the administrator of the estate of the registered owner of the land. Pursuant to the SPA, the respondent paid the deposit sum of RM470,000 ('the deposit') to the applicant. The SPA was conditional upon the vendor obtaining within six months of the date of the SPA an order to transfer the land to the respondent and an order to remove a private caveat lodged on the land ('the preconditions'). Even before the preconditions were fulfilled and without the respondent's knowledge, the applicant released the entire deposit by making payments from it to parties nominated by the administrator and although the entire sum had been depleted, she informed the respondent's solicitors that she was still holding the deposit sum as stakeholder. Due to the vendor's failure to comply with the preconditions, the respondent terminated the SPA and demanded for the return of the deposit together with interest thereon. Since the applicant could not fulfill the demand, the respondent lodged a complaint against the applicant with the Disciplinary Board under the Legal Profession Act 1976. The Disciplinary Committee ('DC'), which investigated the complaint, found the applicant guilty of dishonest and/or fraudulent conduct and deception in the discharge of her duties which had denied the respondent of the refund of its deposit with interest. The DC recommended that the applicant be struck off the Rolls. The Disciplinary Board ('DB') agreed with the DC's finding on liability but disagreed with the striking out punishment and ordered the applicant to be suspended from practising for a year. In the instant application,

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A the applicant sought to set aside the DB's order on the ground that the respondent withdrew its complaint against the applicant after it received the refund of the deposit with interest. The withdrawal of the complaint was, however, only communicated to the DB after it had made its decision. The applicant submitted that if the respondent had informed the DB of its
B withdrawal much earlier — instead of delaying it for six months after it had received its refund of the deposit with interest — the DB might have come to a different decision. The Bar Council, which intervened in the instant proceedings, submitted that since the DB was functus officio after it had made its decision, only the court could vary or set aside the DB's order if it thought
C it fit to do so.

Held, setting aside the DB's order:

(1) The court had to give effect to the withdrawal of the complaint, even if it
D was made after the DB had made its decision. Since the respondent refused to take a stand at the hearing of the instant application, the court could only conclude that there were no cogent or real reasons to suspect the bases for the withdrawal. The question of misconduct or misrepresentation on the part of the applicant no longer arose once the
E complaint was withdrawn. The DB's order was therefore set aside (see paras 34–36).

[Bahasa Malaysia summary

Pemohon adalah seorang peguam yang bertindak bagi penjual dalam
F perjanjian jual beli ('PJB') untuk penjualan sekeping tanah kepada responden. Pihak yang menandatangani PJB sebagai penjual adalah pentadbir harta pusaka pemilik berdaftar tanah tersebut. Menurut PJB, responden membayar jumlah deposit sebanyak RM470,000 ('deposit tersebut') kepada pemohon. PJB tersebut adalah bersyarat apabila penjual mendapatkan dalam tempoh
G enam bulan dari tarikh PJB satu perintah untuk memindah milik tanah tersebut kepada responden dan satu perintah untuk membatalkan kaveat persendirian yang dibuat atas tanah tersebut ('prasyarat'). Sebelum prasyarat dipenuhi dan tanpa pengetahuan responden, pemohon telah melepaskan keseluruhan deposit dengan membuat bayaran daripadanya kepada pihak yang
H dinamakan oleh pentadbir dan walaupun keseluruhan jumlah tersebut telah habis, beliau memaklumkan kepada peguamcara responden bahawa beliau masih memegang deposit tersebut sebagai pemegang kepentingan. Disebabkan kegagalan penjual untuk mematuhi prasyarat, responden menamatkan PJB dan menuntut pemulangan deposit berserta faedah ke atasnya.
I Memandangkan pemohon tidak dapat memenuhi tuntutan tersebut, responden telah membuat aduan terhadap pemohon kepada Lembaga Tatatertib di bawah Akta Profesion Undang-Undang 1976. Jawatankuasa Tatatertib ('JT'), yang menyiasat aduan tersebut, mendapati pemohon bersalah kerana kecurangan dan/atau melakukan tindakan frod dan

memperdaya dalam melaksanakan tugasnya yang telah menafikan responden pengembalian depositnya beserta faedah. JT mengesyorkan agar pemohon dibatalkan daripada Daftarai. Lembaga Tatatertib ('LT') bersetuju dengan dapatan JT mengenai liabiliti tetapi tidak bersetuju dengan hukuman pembatalan dan mengarahkan pemohon digantung daripada menjalankan amalan selama setahun. Dalam permohonan semasa, pemohon memohon untuk mengetepikan perintah LT atas alasan responden menarik balik aduannya terhadap pemohon selepas ia menerima bayaran balik deposit dengan faedah. Penarikan balik aduan tersebut, bagaimanapun, hanya dimaklumkan kepada LT selepas ia membuat keputusan. Pemohon mengemukakan bahawa jika responden telah memaklumkan kepada LT tentang penarikan balik lebih awal — bukannya menangguhkannya selama enam bulan selepas ia menerima bayaran balik deposit dengan faedah — LT mungkin telah membuat keputusan yang berbeza. Majlis Peguam, yang campur tangan dalam prosiding semasa, berhujah bahawa memandangkan LT telah functus officio selepas ia membuat keputusannya, hanya mahkamah boleh mengubah atau mengetepikan perintah LT jika difikirkan sesuai untuk berbuat demikian.

Diputuskan, mengetepikan perintah LT:

(1) Mahkamah terpaksa menguatkuasakan penarikan balik aduan tersebut, walaupun ia dibuat selepas LT membuat keputusannya. Memandangkan responden enggan mengambil pendirian semasa perbicaraan permohonan semasa, mahkamah hanya boleh membuat kesimpulan bahawa tidak ada alasan yang kukuh atau nyata untuk mengesyaki asas bagi penarikan balik tersebut. Persoalan salah laku atau salah nyata di pihak pemohon tidak lagi timbul setelah aduan ditarik balik. Oleh itu perintah LT telah diketepikan (lihat perenggan 34–36).]

Cases referred to

Rosli bin Kamaruddin v How Hock Sing @ Low Kim Chwee, Majlis Peguam Malaysia [2018] MLJU 1559; [2019] 1 CLJ 478, CA (refd)
Sundaram v Chew Choo Khoon [1968] 2 MLJ 40 (refd)

Legislation referred to

Legal Profession Act 1976 ss 103E, 104E
Legal Profession (Disciplinary Proceedings) 2017 rr 8, 9
Rules of Court 2012 O 55 r 2, O 55A

Siti Noor Julaini bt Mohd Shahar (with Shanmugananthan) (Julaini Shahar & Co) for the applicant.
Nur Muhaimin bt Mohd Husaimi (with Aida Suhailah) (Joel & Mei) for the respondent.
J Shamesh (with N Kunaseelan) (Jeeva Partnership) for the intervener.

Wan Ahmad Farid J:

[1] The appellant is at the material time practising as an advocate and solicitor in the name and style of Messrs Zaira & Co.

[2] The respondent company ('the complainant') entered into a sale and purchase agreement ('SPA') on 25 March 2013 with one MKA Annamalai Chettiar s/o Karuppan ('Annamalai') to purchase a piece of land known as Lot 5020, Mukim Kapar, Klang, Selangor ('the said land'). Annamalai ('the vendor') executed the SPA in his capacity as the administrator of the estate of one Marimuthu a/l Govindasamy, the registered owner of the said land.

[3] The agreed purchase price as reflected in the SPA is RM4,704,480.

[4] The complainant, through its solicitor's letter dated 18 February 2013, forwarded a sum of RM470,000 as a deposit ('the deposit') to the applicant.

[5] The SPA was conditional upon the vendor within six months from the date of the SPA obtaining an order to transfer the said land to the complainant. It is also subject to the removal of a private caveat lodged on the said land ('the said orders').

[6] The date on which the complainant's solicitors were to receive the certified true copies of the said orders would be treated as the unconditional date under cl 1 of the SPA ('the unconditional date').

[7] Unbeknown to the complainant or its solicitors, the appellant, however, released part of the deposit to various beneficiaries nominated by Annamalai. A final payment was made to one Lourdesamy Santiago for RM261,360 on 18 July 2013.

[8] Despite the payments to various beneficiaries, the appellant, in a letter dated 7 January 2014, wrote to the complainant's solicitors to confirm that the firm still held the deposit sum as the stakeholder. The letter, inter alia, states as follows:

> We refer to the above matter and your letter dated 18 December 2013.
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> We hereby confirmed [sic] that the deposit sum amounting [to] RM470,000 is held by us as [the] stakeholder.

[9] The complainant terminated the SPA by its letter dated 2 October 2017, alleging the failure on the part of Annamalai to fulfil the conditions precedent

within the stipulated time. It also demanded the refund of the deposit together with interest.

[10] On the complaint lodged by the complainant, the Disciplinary Committee ('DC') found that the appellant was guilty of dishonest and/or fraudulent conduct in the discharge of her duties when acting as solicitor for the vendor in respect of the said land. According to the DC, the applicant's dishonesty resulted in the complainant being deprived of the return of the deposit in a timely manner

[11] The findings on liability of the DC state are as follows:

> It is the unanimous finding of this DC that the respondent is guilty of dishonest and/or fraudulent conduct in the discharge of her duties when acting as the solicitor for the vendor. The dishonesty being in the manner in which she dealt with the conveyancing file under her care in the attempted purchase of [the] said land particulars GM 16679, Lot 5020, Mukim Kapar, District of Klang, State of Selangor involving the complainant and the vendor. The respondent's dishonesty resulted in the complainant being deprived of the return of the deposit of RM4,700,00.00 together with interest, in a timely manner and additionally, in the complainant having to expend considerable time and monies to overcome the deception perpetrated by the respondent as regards to the status of their deposit.

In short, the DC rejected the appellant's second written explanation that the monies were released on the instructions given by the the payees with the stated amount.

[12] The DC made a further finding that the appellant was dishonest, beyond reasonable doubt, when she lulled the complainant into believing that the deposit was in her client's account and the SPA was still valid and subsisting when to her knowledge, the assertion was totally false.

[13] The DC then unanimously recommended for the appellant be struck off the roll.

[14] The Disciplinary Board ('DB') then affirmed the finding of the DC on the liability. However, the DB rejected the recommendation of the DC on the punishment for the appellant to be struck off the Roll. Upon hearing the parties, the DB, instead, ordered the appellant to be suspended from practice as an advocate and solicitor ('the DB order'). The DB order, dated 8 January 2022, inter alia, states as follows:

> IT IS HEREBY ORDERED that the Respondent be suspended from practice as an Advocate and Solicitor of the High Court of Malaya for a period of one (1) year. The Disciplinary Board HEREBY FURTHER ORDERED that the suspension is to

take effect twenty one (21) days from the date of this Order and to expire on 28 January 2023.

[15] The DB order was served on the appellant on 19 January 2022.

[16] Aggrieved by the said decision of the DB, the appellant filed an appeal to this court under s 103E of the Legal Profession Act 1976 ('the LPA'). The appellant seeks for the DB order to be set aside.

[17] In an application in encl 4, the appellant sought a stay of execution pending the disposal of the appeal against the DB order. On 5 October 2022, I allowed the application in encl 4 with no order as to costs.

[18] By way of an application in encl 12, the Bar Council sought leave to be allowed as an intervener in this OS. On 24 March 2022, I allowed the Bar Council's application.

THE ORIGINATING SUMMONS

[19] This originating summons ('OS') is supported by the affidavit of the appellant in encl 2 ('AIS2').

[20] The ground of the OS is anchored on the premise that the respondent had withdrawn the complaint against the appellant on 13 January 2022, five days after the DB order. The letter from the respondent's solicitors ('the withdrawal letter') and addressed to the DB, inter alia, states as follows:

> ... anak guam kami dengan rendah hati berhasrat untuk menarik balik aduan mereka yang difailkan di Lembaga Tatatertib Peguambela dan Peguamcara terhadap responden [*the appellant*] melalui Nombor Aduan DC/17/1002 tersebut.
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> Oleh yang demikian, kami melampirkan bersama-sama dengan surat ini satu (1) salinan Borang Penarikan Balik Aduan bertarikh 10 Januari 2022 yang di[tandatangani] oleh anak guam kami untuk perhatian dan tindakan lanjut pihak Tuan/Puan.

[21] It is not in dispute that the complaint was withdrawn because the appellant had refunded the deposit and interest to the respondent company. The refund was made on 30 June 2021. But it took about seven months for the respondent to withdraw the complaint against the appellant.

[22] Since the withdrawal of the complaint was made after the DB order, it goes without saying that at the time of the affirmation of liability and meting out the punishment, the DB was unaware of the withdrawal letter. The

appellant submitted that had the withdrawal been made known earlier, the DB would have made a different order against the appellant. A

[23] My attention was then drawn to the judgment of the Court of Appeal in *Rosli bin Kamaruddin v How Hock Sing @ Low Kim Chwee, Majlis Peguam Malaysia* [2018] MLJU 1559; [2019] 1 CLJ 478 (CA). The case carries the general proposition that once a complaint is withdrawn, the DB must disband all inquiries relating to the withdrawn complaint. B

ANALYSIS C

[24] Before me, learned counsel for the intervener rightly pointed out that the main issue to be determined in this OS is whether the withdrawal of the complaint by the respondent after the DB order would bring an end to the complaint. The Bar Council's position is that *Rosli Kamaruddin* ought to be distinguished from the instant case. In *Rosli Kamaruddin,* the complainant withdrew the complaint during the proceedings and not after the DB had made a decision. D

[25] My attention was also drawn to r 8 of the Legal Profession (Disciplinary Proceedings) 2017 ('the 2017 Rules'), which provides for the withdrawal of complaints. However, r 8 of the 2017 Rules only relates to a withdrawal by the complainant 'at any time *before a final decision is made* by the Disciplinary Board'. E F

[26] The Bar Council, in its affidavit in reply in encl 20 ('AIR20') affirmed by Anand Raj a/l R Balasupramaniam, affirmed as follows:

> [7] Saya merujuk kepada perenggan 34 Afidavit Sokongan tersebut. Saya dinasihati oleh peguamcara pihak Pencelah dan menyatakan bahawa penarikan balik aduan oleh Responden tidak akan mengubah keputusan Lembaga Tatatertib disebabkan Lembaga Tatatertib telah mengesahkan penemuan liabiliti DC mengenai ketidakjujuran dan kelakuan fraud oleh Pemohon. G
>
> [8] Saya juga telah dinasihati oleh Peguamcara pihak Pencelah dan sesungguhnya percaya bahawa walaupun penarikan balik dibuat oleh Responden, Perintah Muktamad yang dikeluarkan oleh Lembaga Tatatertib hanya boleh diketepikan oleh Mahkamah Yang Mulia ini dan Lembaga Tatatertib tidak mempunyai kuasa untuk meminda keputusannya. H

[27] From the affirmation of Encik Anand Raj, who is the secretary to the Bar Council, it can be distilled that: I

(a) the withdrawal of the complaint does not alter the DB order since, by then, the DB is already functus officio;

(b) however, the DB's affirmation of the finding of liability by the DC in respect of the applicant's dishonesty and fraud remains; and

(c) since the DB is already functus officio, the DB order can only be set aside by this court.

[28] This brings me to the second issue raised by learned counsel for the Bar Council for this court to determine, which is whether the conduct of the appellant would amount to professional misconduct.

[29] The Bar Council's anxiety on the issue is understandable. The appellant had misrepresented to the respondent's solicitors that the deposit was still in the appellant's possession when in actual fact, the whole sum had been disbursed on the instruction of the appellant's clients.

[30] To begin with, this is an appeal under O 55A of the Rules of Court 2012 ('the ROC'). It is not a continuation of a judicial process. An appeal made under s 104E of the Legal Profession Act 1976 read together with O 55A is an origination, hence the mode is by way of an OS; see *Sundaram v Chew Choo Khoon* [1968] 2 MLJ 40. In short, it is not an appeal from subordinate courts, which, according to O 55 r 2, is by way of a rehearing.

[31] Notwithstanding that this appeal is not by way of a rehearing, I have to take cognisance that the complaint against the appellant had been withdrawn. I also take note that at the hearing of this OS on 5 October 2022, learned counsel for the respondent intimated to the court that the respondent would not be taking any position on the OS.

[32] The Bar Council is also in a predicament. Had the withdrawal of the complaint took place during the proceedings at the DC or the DB, it could have intervened under r 9 of the 2017 Rules. Since the DB had made the final order, it was too late for the Bar Council to intervene before the DB.

[33] Mary Lim JCA (now FCJ) in delivering the judgment of the Court of Appeal in *Rosli Kamaruddin,* held that:

> It is upon a complaint lodged that the DB and thence a DC will act. The DC will investigate, report its findings and make its recommendations to the DB. The moment a complaint is withdrawn, unless there are cogent and real reasons for the DB to suspect otherwise the reasons for the withdrawal, the DB must disband all inquiry relating to the withdrawn complaint. There is no residual power or anything akin to inherent power or retained jurisdiction on the part of the DB and certainly even less, in respect of the DC, to investigate, unless the DB itself lodges a fresh complaint on the same.

[34] As I alluded to earlier, I have to give effect to the withdrawal of the complaint, even if it is made after the DB order. Since the complainant refused to take a stance on this OS, I can only conclude that there are no cogent and real reasons for me to suspect on the bases of the withdrawal.

[35] The question of misconduct or misrepresentation on the appellant no longer arises once the complaint is withdrawn.

[36] The DB order is therefore set aside.

[37] However, I am making an order for the appellant to pay costs of RM10,000 to the Bar Council, subject to allocatur.

DB's order set aside.

Reported by Ashok Kumar